Supreme Court, U.S.
FILED

No. 02 304 AUG - 1 2002

OFFICE OF THE CLERK

In The
Supreme Court of the United States

FREDERICK C. FERMIN,

Petitioner,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security Administration,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

FREDERICK C. FERMIN
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20 pp

QUESTIONS PRESENTED

1. After judgment by Magistrate Judge, **if petitioner wants to appeal**, is petitioner compelled to appeal directly to United States Court of Appeals For The Fifth Circuit?

2. Whether United States Magistrate Judge's Order filed July 27, 2001, Appendix 3, constitutes abuse of discretion for depriving petitioner's right to appeal the Magistrate's Judgment pursuant to United States District Court For The Western District of Texas Local Rule under valid **Appendix "C" Rule 4(e)(2)A?**

3. Whether petitioner's appeal to United States District Court For The Western District of Texas San Antonio Division **filed July 26, 2001**, Appendix 7, legally supersedes selection under **28 U.S.C. Section 636(c)(3)**, because of the word "**may**" in the statute, as in special reference to Appendix 3, based on the fact petitioner's appeal in Appendix 7, is petitioner's final choice or procedure of appeal?

4. Whether United States Court of Appeals For The Fifth Circuit lacks jurisdiction over petitioner's appeal?

5. Whether United States District Court For The Western District of Texas Local Rule under **Appendix "C" Rule 4(e)(2)A**, should be **repealed** because the Rule is not authorized by the **amended** United States Code **Title 28, Section 636(c)**, and the fact the Rule in question is in conflict with the case of ***Carter v. Clerk*, 616 F.2d 288 (5th Cir.1980)**?

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Frederick C. Fermin, respectfully petitions for writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit Appendix 1, is unreported, the judgment of the United States District Court For The Western District of Texas, Appendix 2, is also unreported.

JURISDICTION

The court of appeals entered its opinion and judgment on **May 14, 2002**, Appendix 1. Petitioner's petition for Panel Rehearing was denied on **June 11, 2002, Appendix 6**. The jurisdiction of this Court is invoked under **28 U.S.C. Section 1254(1)**.

CONSTITUTIONAL PROVISION INVOLVED

The 14th Amendment of the United States Constitution, which provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Proceedings

Respondent and Petitioner agreed to the procedure as stated in the **amended** United States Code Title 28, Section **636(c)(3)**, that reads as follows:

> "Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party **may** appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. **The consent of the parties** allows a magistrate designated to exercise **civil jurisdiction** under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. **Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States."**

Petitioner has the option or choice to remain with the above consent, or to appeal the Magistrate's Judgment under United States District Court For The Western District of Texas Local Rule under the **valid Appendix "C" Rule 4(e)(2)A**. United States Court of Appeals Fifth Circuit's opinion Appendix 1, page A-2 reads:

> **"Fermin's motion relies on an outdated version of the governing statute**. In accordance with the applicable version of 28 U.S.C. 636(c), Fermin consented to proceed to a judgment before a magistrate judge under 28 U.S.C. 636(c)(1) and therefore his appeal properly lies with this court. See 28 U.S.C. 636(c)(3). An Aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the

magistrate in the same manner as an appeal from any other judgment of a district court."

The above opinion regarding "Fermin's motion relies on an outdated version of the governing statute" **The Panel Judges are correct**, but said **original** statute United States Code Title 28, Section **636(c)(4)**, was made valid pursuant to United States Court For The Western District of Texas Local Rule under Appendix "C" Rule 4(e)(2)A.

Any illegal United States District Court Local Rule must remain valid, pursuant to United States Code Title **28, Section 2071(c)(1)**, that reads: **"A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit."** Petitioner's litigation is still open to insert more claims, because no final judgment has been made on Remand Order by United States District Court concerning **Appendix 4**. *Melkonyan v. Sullivan*, 501 U.S. 102 *last paragraph* (1991) The Fifth Circuit Panel Judges failed to notice that petitioner's appeal Appendix 7, was and is under United States District Court For The Western District of Texas under **Appendix "C" Rule 4(e)(2)A**, Revised January 2, 2001. Therefore, for the foregoing authority 28 U.S.C. 2071(c)(1), United States Court of Appeals Fifth Circuit is without legal jurisdiction over petitioner's appeal, and are without legal authority to imposed $200.00 sanction against petitioner.

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF WRIT

The valid United States District Court For The Western District of Texas Local Rule under **Appendix**

"C" Rule 4(e)(2)A, is in violation of Supreme Court Policy as cited in the case of *Carter v. Clerk*, 616 F.2d 228 (5th Cir.1980), and said Rule in question is misleading all attorneys that practice law in the State of Texas, also the fact Fifth Circuit Court of Appeals does not have legal jurisdiction over petitioner's appeal, and the injustice to obligate petitioner to pay the $105.00 for docking the appeal.

REASONS FOR GRANTING WRIT OF CERTIORARI

United States Court of Appeals Fifth Circuit is responsible for authorizing United States Court For The Western District of Texas San Antonio Division Local Rule under Appendix "C" Rule 4(e)(2)A, Revised January 2, 2001. See 28 U.S.C. § 2071(c)(1). **The key for granting the writ is the case of *In Re Wilson*, 153 F. Supp. 2d 1013 (E.D. Ark. 2001)** page 1014 paragraph 8 reads: **"Once enacted, local rules have force and effect of law and are binding on parties** and court which promulgated them until they are changed in appropriate manner." In the opinion and judgment Appendix 1, the Panel Judges stated **"Fermin's motion relies on an outdated version of the governing statute"**, which is in direct contradiction of United States District Court for the District of Texas Local Rule under **Appendix "C" Rule 4(e)(2)A**.

WHO WILL BENEFIT THE MOST IF WRIT IS GRANTED

All attorneys that practice law in the State of Texas shall benefit by granting petition for writ of certiorari, and will terminate confusion in all United States District

Courts in the State of Texas, in reference to the valid Local Rule that is in conflict with the case of *Carter v. Clerk*, 616 F.2d 228 (5th Cir.1980)

PRAYER FOR RELIEF

Petitioner respectfully requests that U.S. Court of Appeals for the Fifth Circuit opinion and judgment be vacated, based on the fact Fifth Circuit does not have legal jurisdiction over petitioner's appeal. The appeal should be returned to the U.S. District Court for final adjudication based on the merits of the case. Also that U.S. Magistrate Judge's Order filed July 27, 2001, Appendix 3, be declared moot, because of valid U.S. District Court For The Western District of Texas San Antonio Division Local Rule under Appendix "C" Rule 4(e)(2)A, **which legally supersedes Magistrate's illegal Order**.

CONCLUSION

Petitioner has complied with Supreme Court **Rule 14(a), (b), (c), (d), (e), (i)(ii)(iv)(f), (g), (ii), (h), (i)**. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit is timely filed pursuant to Supreme Court **Rule 13.3**. Therefore, in the interest of justice for the general public in the State of Texas, **the pending writ of certiorari should be granted**.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01-50741
Summary Calendar

FREDERICK C. FERMIN,

Plaintiff-Appellant,

versus

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-00-CV-1288

(Filed May 14, 2002)

Before JOLLY, STEWART and DENNIS, Circuit Judges.

PER CURIAM:*

Frederick C. Fermin ("Fermin") appeals the district court's judgment affirming the decision of the Commissioner of Social Security awarding Fermin retirement

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

insurance benefits ("RIB") as of February 1995 but refusing to reopen Fermin's 1987 application for RIB. Fermin has filed a motion requesting that this appeal be transferred to the district court, contending that the magistrate judge was without authority to construe his notice of appeal as an appeal to this court. Fermin's motion relies on an outdated version of the governing statute. In accordance with the applicable version of 28 U.S.C. § 636(c), Fermin consented to proceed to a judgment before a magistrate judge under 28 U.S.C. § 636(c)(1) and therefore his appeal properly lies with this court. *See* 28 U.S.C. § 636(c)(3) ("[A]n aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court."). The motion is DENIED. Fermin has also moved for leave to file a nontechnical summary of Social Security laws and regulations. That motion is also DENIED.

The only issues raised by Fermin concern his attempts to relitigate a 1973 claim for disability benefits. However, there is no decision on Fermin's entitlement to disability benefits for this court to review. The scope of this court's review is limited to determining whether there was substantial evidence in the record to support the Commissioner's decision on RIB. *See Marcello v. Bowen*, 803 F.2d 851, 853 (5th Cir. 1986). Fermin does not raise or brief the issues whether the Commissioner's decisions concerning his 1987 and 1995 RIB applications are supported by substantial evidence, therefore those issues are waived. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993). Further, the magistrate judge did not err in determining that the issue whether the Appeals Council erred in not

reopening Fermin's disability case was not before the court.

This appeal is without arguable merit and thus frivolous. *See Howard v. King*, 707 F.2d 215, 219-20 (5TH CIR. 1983). Because the appeal is frivolous, it is DISMISSED. 5TH CIR. R. 42.2.

Fermin previously has been sanctioned by this court for filing frivolous appeals. *See Fermin v. United States*, No. 98-50483 (5th Cir. Apr. 19, 1999) (unpublished). Therefore, IT IS ORDERED that Fermin is sanctioned** $200.00. IT IS ALSO ORDERED that Fermin remit payment to the Clerk of this Court. The Clerk of this Court and the clerks of all federal district courts within this Circuit are directed to refuse to file any pro se civil complaint or appeal by Fermin unless Fermin submits proof of satisfaction of this sanction.

APPEAL DISMISSED; SANCTION IMPOSED.

** The appellee has not moved for sanctions. We have the authority to impose sanctions sua sponte. *See Coghlan v. Starkey*, 852 F.2d 806, 808 (5th Cir. 1988).

APPENDIX 2

United States District Court
Western District of Texas

FREDERICK C. FERMIN,

Plaintiff

v.

LARRY G. MASSANARI, Acting Commissioner of the Social Security Administration,

Defendant

JUDGMENT IN A CIVIL CASE

(Filed Jul. 23, 2001)

CASE NUMBER: SA-00-CA-1288-PM

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

consistent with this Court's Memorandum Decision and Order filed this same date:

It is ORDERED that Plaintiff's Complaint is DISMISSED and the Commissioner's decision is AFFIRMED

July 23, 2001
Date

William G. Putnicki
Clerk

/s/ Carol West Carol West
(By) Deputy Clerk

APPENDIX 3

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

FREDERICK C. FERMIN,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL NO.
	§	SA-00-CA-1288-PM
LARRY G. MASSANARI, Acting COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION,	§	
	§	
	§	
	§	
Defendant.	§	

ORDER

(Filed Jul. 27, 2001)

Came on this day to be considered plaintiff's "notice of appeal to the United States District Court" (docket no. 46) filed July 26, 2001.

The docket sheets and record reflect that plaintiff consented to trial by a United States Magistrate on April 17 and April 18, 2001 (docket nos. 22 and 23),[1]

[1] The April 5, 2001 scheduling order set a deadline of on or before plaintiff's brief was filed to file a consent to Magistrate Court jurisdiction. The Scheduling Order provided that the consent would be "to a Magistrate Judge conducting all further proceedings in this case, including entry of final judgment, with appeal to the United States Court of Appeals for the Fifth Circuit. A party is free not to consent without any adverse consequences. 28 U.S.C. § 636(c)(2) and

(Continued on following page)

following defendants' earlier consent to Magistrate Court jurisdiction (docket no. 22). On April 20, 2001, United States District Court Judge H. F. Garcia approved consents and the case was reassigned to the undersigned for all purposes pursuant to 28 U.S.C. § 636(c)(1).

Therefore, if plaintiff wishes to appeal the undersigned's final Order and judgment entered in this case entered July 23, 2001, plaintiff will need to file a notice of appeal to the United States Court of Appeals for the Fifth Circuit. In deference to plaintiff's *pro se* status, this Court is willing to construe plaintiff's notice of appeal to the District Court as a notice of appeal to the United States Court of Appeals for the Fifth Circuit.

IT IS ORDERED that plaintiff's "notice of appeal to the United States District Court" (docket no. 46) is hereby construed as a notice of appeal to the United States Court of Appeals for the Fifth Circuit. Plaintiff otherwise must comply with all rules regarding the perfection and taking of his appeal to the United States Court of Appeals for the Fifth Circuit.

IT IS SO ORDERED.

Fed.R.Civ.P. 73(b). Absent the filing of a written consent, the Magistrate Judge will prepare a report and recommendation to the District Court" (docket no. 17 at 2-3). *See also* docket nos. 22 and 23.

SIGNED and ENTERED this 27 day of July, 2001.

/s/ Pamela Mathy
Pamela Mathy
United States
Magistrate Judge

APPENDIX 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FREDERICK C. FERMIN,	*	
	*	
Plaintiff,	*	
V.	*	**SA-97-CA-1269**
	*	
KENNETH S. APFEL, Commissioner of the Social Security Administration,	*	
	*	
Defendant.	*	

ORDER

(Filed Feb. 11, 1998)

On this date came on for consideration the above-styled and numbered cause. Also under consideration is the Memorandum and Recommendation of United States Magistrate Judge John W. Primomo to which no objections have been filed. After conducting an independent review of the record in this cause, and finding no plain error, the Court hereby **ADOPTS** the Magistrate Judge's Memorandum and Recommendation, and incorporates same herein.

Accordingly, it is **ORDERED** that the defendant's motion to dismiss is **DENIED**. This matter is hereby **REMANDED** to the Commissioner.

Signed this 11th day of February , 1998.

/s/ H. F. Garcia
H. F. GARCIA
UNITED STATES
DISTRICT JUDGE

APPENDIX 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-50741

FREDERICK C FERMIN

Plaintiff-Appellant

v.

JO ANNE B BARNHART,
COMMISSIONER OF SOCIAL SECURITY

Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas, San Antonio

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(Filed Jul. 22, 2002)

ORDER:

IT IS ORDERED that appellant's motion to stay the mandate is DENIED.

/s/ Carl E. Stewart
CARL E. STEWART
UNITED STATES
CIRCUIT JUDGE

APPENDIX 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-50741

FREDERICK C FERMIN,

Plaintiff-Appellant,

v.

JO ANNE B BARNHART,
COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING

(Filed Jun. 11, 2002)

Before JOLLY, STEWART and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FREDERICK C. FERMIN,
SSN: 454-24-9053
PLAINTIFF,

CIVIL ACTION NO. SA-00-CA-1288-PM

VS.

LARRY G. MASSANARI,
ACTING COMMISSIONER
OF THE SOCIAL SECU-
RITY ADMINISTRATION,
DEFENDANT.

PLAINTIFF'S NOTICE OF APPEAL TO THE UNITED STATES DISTRICT COURT

(Filed July 26, 2001)

This Notice of Appeal is for the Honorable H.F. Garcia, United States District Judge. Plaintiff has filed appeal on July 26, 2001, concerning Pamela A. Mathy' Memorandum Decision and Order with Judgment filed July 23, 2001. Plaintiff's right to file Notice of Appeal is pursuant to **Local Rules in reference to Appendix "C" Rule 4(e)(2)(A)(B)** (C). Paragraph D, of Rule 4(e)(2) reads as follows:

MEMORANDA

The appellant shall within 30 days of the filing of the notice of appeal file a typewritten memorandum with the clerk, **together with two additional copies**, stating the specific facts, points of

> dum with the clerk, **together with two additional copies**, stating the specific facts, points of law, and authorities **on which the appeal is based**. The appellant shall also serve a copy of the memorandum on the appellee or appellees. The appellees shall file an answering memorandum within 30 days of the filing of the appellant's memorandum. The court may extend these time limits upon a showing of good cause made by the party requesting the extension. Such good cause may include reasonable delay in the preparation of any necessary transcript. If an appellant fails to file his/her memorandum within the time provided by this rule, or any extension thereof, the court may dismiss the appeal."

Plaintiff's understanding that there is no charge of fee for the filing of the Notice of Appeal.

Respectfully submitted,

/s/ Frederick C. Fermin
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